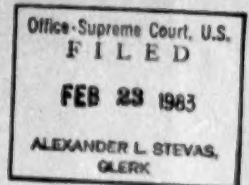


CASE NO. 82-1375



IN THE  
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1982

RICHARD HOWARD EHLINGER,  
Petitioner,  
versus  
UNITED STATES OF AMERICA,  
Respondent.

SWORN MOTION TO ACCEPT  
AS TIMELY FILED  
PETITION FOR CERTIORARI  
AT THE UNITED STATES  
SUPREME COURT

COMES NOW, the Petitioner, RICHARD HOWARD EHLINGER, by and through his undersigned attorney, and hereby submits this Sworn Motion to Accept as Timely Filed the Petition for Certiorari in the United States Supreme Court. In support thereof, the Petitioner states:

1. On September 23, 1982, the United States Court of Appeals for the Eleventh Circuit affirmed the judgment of conviction of the United States District Court for the Southern District of Florida in this case. (Attached as Exhibit "1").
2. Thereafter, the Petitioner, RICHARD HOWARD EHLINGER, filed a timely Petition for Rehearing and Suggestion for Rehearing En Banc in the United States Court of Appeals for the Eleventh Circuit.
3. The Petitioner had not recieved an order denying the Petition for Rehearing but did, on December 22, 1982, receive a copy of a letter dated December 15, 1982, to the Clerk of the United States District Court for the Southern District of Florida, and a copy of the judgment

of this Court issued as and for the mandate. (December 22, 1982, letter attached as Exhibit "2").

4. After receipt of the December 15, 1982, letter, the undersigned advised the Petitioner of the procedure still available to him. The Petitioner advised the undersigned that he wished to apply to the United States Supreme Court for a Writ of Certiorari and wished to seek a stay of mandate pending application for a Writ of Certiorari.

5. Indeed, the undersigned concluded that the December 15, 1982, judgment and issuance of mandate constituted the denial of Petition for Rehearing. (See Motion to Recall and Stay Issuance of Mandate and Memorandum of Law attached as Exhibit "3").

6. Using the December 15, 1982, date for computation of the time within which to file a Petition for Certiorari, the Petition was due on February 14, 1983.

7. An associate attorney employed by the undersigned, G. BARTRAM BILLBROUGH, received a telephone call approximately 4:00 p.m. on February 16, 1983, from a Clerk of the United States Supreme Court. The Clerk informed Mr. Billbrough that the Petition was not timely filed because the Motion for Rehearing was denied on November 30, 1982.

8. The undersigned and Mr. Billbrough have monitored the process of appeal in this case. Further, no denial of the Motion for Rehearing was ever received. In fact, the only document ever indicating a denial of the Motion for Rehearing was the December 15, 1982, communication from the United States Court of Appeals for the Eleventh Circuit. (See attached Affidavit, of the undersigned and Mr. Billbrough, Exhibits "4" and "5", respectively).

9. Although this Sworn Motion to Accept as Timely Filed does not strictly comply with Sup. Ct. R. 29, failure to consider the merits of this Motion would constitute a grave injustice and deny the Petitioner due process of law. The Petitioner should not be held accountable and punished by a failure by the United States Court of Appeals for the Eleventh Circuit or the United States Postal Service to communicate a copy of the Motion for Rehearing.


WHEREFORE, the Petitioner respectfully requests this Court grant his Sworn Motion to Accept as Timely Filed the Petition for Certiorari to the United States Supreme Court.

Respectfully submitted,

By: 

CHARLES O. FARRAR, JR.  
201 Alhambra Circle, Suite 1200  
Coral Gables, Florida 33134  
Telephone: (305) 444-1599

SWORN TO and SUBSCRIBED before this 18 day of February, 1983.

  
NOTARY PUBLIC, STATE OF  
FLORIDA

My Commission Expires:

NOTARY PUBLIC STATE OF FLORIDA  
MY COMMISSION EXPIRES OCT 23 1982  
BONDED BY GENERAL REG. UNDERWRITERS

#### CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was mailed/hand delivered to Bruce Zimet, Esq., Assistant United States Attorney, 155 South Miami Avenue, Miami, Florida 33130, Solicitor General, Department of Justice, Washington, D.C. 20530, this 22nd day of February, 1983.

By: 

CHARLES O. FARRAR, JR.

cc: Richard Ehlinger

DO NOT PUBLISH

IN THE UNITED STATES COURT OF APPEALS  
FOR THE ELEVENTH CIRCUIT

---

No. 81-6089  
Non-Argument Calendar

---

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

RICHARD HOWARD EHLINGER,

Defendant-Appellant.

---

APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF FLORIDA

---

(September 23, 1982)

Before GODBOLD, Chief Judge, FAY and CLARK, Circuit Judges.

PER CURIAM:

Richard Howard Ehlinger appeals his conviction of possession with intent to distribute marijuana and conspiracy to possess marijuana with intent to distribute in violation of 21 U.S.C. § 846. We have examined Ehlinger's contentions and have found them to be without merit.

Therefore, we affirm his conviction.

Ehlinger contends that the trial court erred in failing to grant his motion for a judgment of acquittal on the grounds that there was insufficient evidence to sustain his conviction for conspiracy and the possession of a controlled substance. Ehlinger's contention must, however, fail. Under Glasser v. United States, 361 U.S. 60 (1942), this court is charged with viewing the evidence and all inferences that may reasonably be drawn from it

in the light most favorable to the government. When the evidence is viewed in this manner, it is sufficient to support Ehlinger's conviction.

On January 9, 1981, special agents of the Drug Enforcement Administration sought to purchase marijuana from a group of individuals. These agents initially met with one of Ehlinger's co-defendants, Gerald Todd. It was arranged that the agents would purchase 28,000 pounds of marijuana at \$250 per pound. While these negotiations were taking place, Todd made a number of phone calls. During the course of the negotiations, a Cadillac driven by one of Ehlinger's co-defendants, Eugene Fox, pulled up. Ehlinger was a passenger in the car. The appellant was present when Fox informed the agents that a load of fourteen tons of marijuana was en route. The appellant later made calculations computing the price that the agents were to pay for the marijuana. He also explained to the agents the location of seven bales of marijuana and announced that their price was \$74,000.

Soon afterward, a van full of marijuana pulled up. Ehlinger, after some discussion, drove the van to a truck and helped unload the marijuana. He also conducted an inventory of the marijuana, checking the bale numbers against the weight of the individual bales.

Under these facts, the jury could have found the evidence sufficient to convict Ehlinger. Consequently, we reject Ehlinger's contentions on this point.

The appellant also argues that the trial court abused its discretion in failing to grant his motion for a continuance because of his injuries. Motions for continuance are addressed to the sound discretion of the

court. This discretion is not disturbed on appeal unless there is a clear showing of abuse of discretion. See, e.g., United States v. Nickerson, 669 F.2d 1016 (5th Cir. 1982); United States v. Harbin, 601 F.2d 773 (5th Cir.), cert. denied, 444 U.S. 954 (1979).

The court below did not abuse its discretion. The trial judge inquired as to whether the defendant's mind was clear and he responded affirmatively. Further, when informed that the defendant could only sit for an hour without suffering pain, the trial judge announced that the trial would be in hour-long segments, followed by recesses. Neither appellant nor his counsel complained of appellant's discomfort during the trial. Nor did appellant present any evidence that the drugs he was taking affected his thinking or his ability to assist his counsel before or during trial. Thus, we find that Ehlinger's contention is meritless.

*Protest*  
*Mr. Ehlinger*  
*in presence of*

Lastly, Ehlinger contends that the trial court erred in failing to grant his motion for mistrial due to a prosecutorial comment on his silence. Specifically, the following prosecutorial statement during closing argument is complained of:

He makes a big deal about where that came from, the saying that it was incorrect in his report. The question was, "Isn't it a fact that you submitted a report that it was found in his pocket, but it was found in a container?"

There is absolutely no contention that the container didn't belong to Mr. Ehlinger.

(Record, at 217.)

"Prosecutorial reference to the 'uncontradicted' state of evidence constitutes impermissible comment of the defendant's exercise of the right to remain silent

only if: (1) the prosecutor's manifest intention was to comment on the defendant's failure to testify, or (2) the remark was such that the jury would naturally and necessarily take it to be a comment on the failure of the defendant to testify." Williams v. Wainwright, 673 F.2d 1182, 1184 (11th Cir. 1982). Under Williams, if a plausible explanation for the prosecutorial comment other than pointing out the defendant's failure to testify is present, the first part of the test is satisfied. In the instant case, the disputed remark was merely a reference to the fact that although where a certain document was found was disputed, it was undisputed that it was under Ehlinger's control. Thus, the appellant fails on the first prong of the Williams test. Devel

Secondly, from examining the record, we find that the jury would not "naturally and necessarily" take the reference to be a comment on the accused's silence. Therefore, Ehlinger has failed to carry the day on the second point of the Williams test.

We have examined all of Ehlinger's contentions and have found them to be meritless. Consequently, the affirmation of his conviction is required.

AFFIRMED.

UNITED STATES COURT OF APPEALS  
ELEVENTH CIRCUIT  
OFFICE OF THE CLERK

NORMAN E. ZOLLER  
CLERK

December 15, 1982

TEL. 404-531-9187  
FTD-245-9187  
88 FORTYTH ST. N.W.  
ATLANTA, GEORGIA 30303

Clerk, U. S. District Court  
Southern District of Florida  
Ft. Lauderdale Division

RE: 81-6007-Cr-NCR  
USA -v- RICHARD HOWARD EHLINGER

APPEAL NO. 81-6089

- (✓) Enclosed is a certified copy of the judgment of this Court in the above case issued as and for the mandate.
- ( ) Enclosed is a certified copy of the Rule 25 Decision in the above case issued as and for the mandate.

Enclosed herewith are the following additional documents:

- (✓) Copy of the Court's opinion. (Non published)
- (✓) Original record on appeal or review. (3 vol.)
- (✓) Original exhibits. (1 envelope)
- ( ) Bill of Costs approved by this Court.
- ( ) Note: { The record, exhibits, etc. are out to the writing Judge, and will be returned at a later date.

Please acknowledge receipt.

Sincerely,

NORMAN E. ZOLLER, Clerk

CC: Charles O. Farrar, Atty.  
1401 Brickell Ave. #900  
Miami, Fl. 33131  
Bruce Zimet, AUSA/Miami

BY: Wm. L. Sanders  
Deputy Clerk  
Wm. L. Sanders

MDT-1

Exhibit "2"

**United States Court of Appeals  
FOR THE ELEVENTH CIRCUIT**

**COPY**

**No. 81-6089  
Non-Argument Calendar**

**D.C. Docket No. 81-6007-CR-NCR**

**U.S. COURT OF APPEALS  
ELEVENTH CIRCUIT  
FILED**

**DEC 15 1982**

**NORMAN E. ZOLLER  
CLERK**

**UNITED STATES OF AMERICA,**

**Plaintiff-Appellee,**

**versus**

**RICHARD HOWARD EHLINGER,**

**Defendant-Appellant.**

**Appeal from the United States District Court for the  
Southern District of Florida**

**Before GODBOLD, Chief Judge, FAY and CLARK, Circuit Judges.**

**J U D G M E N T**

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Florida, and was taken under submission by the Court upon the record and briefs on file, pursuant to Rule 23;

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the judgment of conviction of the said District Court in this cause be and the same is hereby AFFIRMED.

September 23, 1982

UNITED STATES COURT OF APPEALS  
FOR THE ELEVENTH CIRCUIT

CASE NO. 81-6089

UNITED STATES OF AMERICA,	:	
Plaintiff-Appellee,	:	
vs.	:	MOTION TO RECALL AND STAY
	:	ISSUANCE OF MANDATE AND
RICHARD HOWARD EHLINGER,	:	MEMORANDUM OF LAW
Defendant-Appellant.	:	

---

COMES NOW the Appellant, Richard Howard Ehlinger, by and through his undersigned attorney, and moves this Honorable Court to recall the issuance of the mandate in this cause and in support thereof states:

1. On September 23, 1982, this Honorable Court affirmed the judgment of conviction of the United States District Court for the Southern District of Florida (attached as Exhibit No. 1).
2. Thereafter Appellant filed a timely Petition for Rehearing and suggestion for rehearing en banc.
3. Appellant has not received an order denying the Petition for Rehearing but did, on December 22, 1982, receive a copy of letter dated December 15, 1982, to the Clerk of the United States District Court for the Southern District of Florida, and a copy of the judgment of this Court in the case issued as and for the mandate (December 22, 1982, letter attached as Exhibit No. 2).
4. After receipt of this Court's letter dated December 15th and received December 22, 1982, the undersigned advised the Appellant of the procedures still available to him.

5. Appellant advised the undersigned that he wished to apply to the Supreme Court for a writ of certiorari and wished to seek a stay of the mandate of this Court pending said application for a writ of certiorari.

6. Appellant believes that substantial questions are to be presented to the Supreme Court, to wit:

- A. DID THE TRIAL COURT ERR IN FAILING TO GRANT THE APPELLANT'S MOTION FOR MISTRIAL DUE TO PROSECUTORIAL MISCONDUCT DURING CLOSING ARGUMENTS WHEN THE PROSECUTOR ARGUED THAT EVIDENCE, SUPPRESSED BEFORE THE TRIAL AND NOT INTRODUCED, BELONGED TO THE DEFENDANT?
- B. DID THE PANEL ERR IN FINDING NO ABUSE OF DISCRETION WHERE THE TRIAL COURT DENIED THE DEFENDANT'S MOTION FOR CONTINUANCE AFTER THE DEFENDANT INDICATED HE WAS UNDER THE INFLUENCE OF DRUGS?

Further, Appellant does not believe that the application is frivolous nor does he seek it for purposes of delay.

7. It is respectfully suggested that a recall of the mandate is required to prevent injustice.

#### MEMORANDUM OF LAW

8. Rule 41(a), F.R.A.P., provides in pertinent part that:

"If the petition [for rehearing] is denied, the mandate shall issue 7 days after entry of the order denying the petition unless the time is shortened or enlarged by order."

9. Rule 41(b), F.R.A.P., provides that:

"A stay of the mandate pending application to the Supreme Court for a writ of certiorari may be granted upon motion . . ."

10. Since the Appellant has not received a copy of this Court's order denying this petition for rehearing, and since the mandate of this Court was issued on December 15, 1982, a stay cannot be issued unless the mandate is recalled.

11. It is well recognized that this Court may recall its mandate to prevent injustice. Gradsky v. United States, 376 F.2d 993 (5th Cir. 1967). Rule 27(c), United States Court of Appeals for the Eleventh Circuit.

CONCLUSION

WHEREFORE, the Appellant respectfully requests that the mandate previously issued in this cause be recalled and stayed pursuant to Rule 41, F.R.A.P.

Respectfully submitted,

LYONS AND FARRAR, P.A.  
Attorneys for Defendant-Appellant  
P. O. Box 144154  
Coral Gables, Florida 33114-4154  
(305) 444-1599

By: Charles O. Farrar, Jr. for  
CHARLES O. FARRAR, JR.

CERTIFICATE OF INTERESTED PARTIES

It is hereby certified that the United States and Richard Howard Ehlinger are those parties having an interest in the outcome of this case.

Charles O. Farrar, Jr. for  
CHARLES O. FARRAR, JR.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Motion to Recall and Stay Issuance of Mandate and Memorandum of Law was served by mail this 4<sup>th</sup> day of January, 1983, upon Bruce Zimet, Assistant United States Attorney, 299 E. Broward Blvd., Ft. Lauderdale, Florida.

2 Bmt B.W. 2 172  
CHARLES O. FARRAR, JR.

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IN THE  
SUPREME COURT OF THE UNITED STATES

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OCTOBER TERM 1982

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RICHARD HOWARD EHLINGER,  
Petitioner,  
versus  
UNITED STATES OF AMERICA,  
Respondent.

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AFFIDAVIT OF  
CHARLES O. FARRAR

---

I, CHARLES O. FARRAR, JR., after being first duly sworn, do hereby depose and state:

1. I have been the attorney of record throughout the appellate process of United States v. Richard Howard Ehlinger.

2. I have continually monitored the progress and status of the appellate process in this case throughout the entire period.

3. The only documentation ever received by my office has been a September 23, 1982, affirmance of the Judgment of Conviction of Richard Howard Ehlinger and the December 15, 1982, Judgment of Affirmance and Issuance of Mandate.

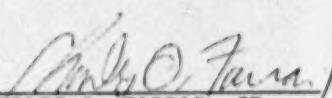
4. No formal documentation was ever received by myself or my office informing Richard Howard Ehlinger that his Motion for Rehearing had been denied.

5. The only conclusion that I reasonably could draw was that the December 15, 1982, Issuance of Mandate and Judgment of Affirmance constituted the denial of the Motion for Rehearing.

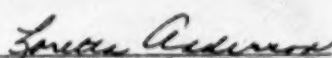
6. Using the December 15, 1982, date to compute the time for filing the Petition for Writ of Certiorari, the date due was February 14, 1983.

7. The Petition for Certiorari was otherwise filed in compliance with the Court's rules.

FURTHER AFFIANT SAYETH NOT.

  
CHARLES O. FARRAR, JR.

SWORN TO and SUBSCRIBED before me this 18 day  
of February, 1983.

  
NOTARY PUBLIC, STATE OF  
FLORIDA

My Commission Expires:

NOTARY PUBLIC STATE OF FLORIDA AT LARGE  
MY COMMISSION EXPIRES OCT 23 1983  
RECORD DEPT. GUNDA 105, UNRECORDED

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IN THE  
SUPREME COURT OF THE UNITED STATES

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OCTOBER TERM 1982

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RICHARD HOWARD EHLINGER,  
Petitioner,  
versus  
UNITED STATES OF AMERICA,  
Respondent.

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AFFIDAVIT OF  
G. BARTRAM BILLBROUGH

---

I, G. BARTRAM BILLBROUGH, JR., after being first  
duly sworn, do hereby depose and state:

1. I am employed by the law firm of LYONS AND  
FARRAR, P.A., and have been so employed since February of 1981.

2. During the time employed by LYONS AND FARRAR,  
P.A., I have monitored the status and progress of the appellate  
cases of the Petitioner, RICHARD HOWARD EHLINGER.

3. I have never received nor have I ever seen  
a denial of Richard Howard Ehlinger's Motion for Rehearing  
and Suggestion for Rehearing En Banc, dated November 30, 1982.

4. The only correspondence ever received regarding  
a denial on the Motion for Rehearing and Suggestion for  
Rehearing En Banc was a December 15, 1982, order affirming  
RICHARD HOWARD EHLINGER'S conviction and issuance of mandate.

5. No further documentation has been received  
with regard to the status of RICHARD HOWARD EHLINGER'S Motion  
for Rehearing or Suggestion for Rehearing En Banc.

7. I received a call from the United States Supreme Court Clerk's office on February 16, 1983, stating that the Motion for Rehearing was denied on November 30, 1982. This was the first time that I or anyone in my office learned of such a date or document.

G. BARTRAM BILLBROUGH, JR.

Loretta Anderson  
NOTARY PUBLIC, STATE OF  
FLORIDA

**My Commission Expires:**  
**ROTARY PUBLIC STATE OF FLORIDA**  
**MY COMMISSION EXPIRES OCT 23 1965**  
**BONDED JOHN GUNDEL 1962, 65/66/67/68/69**